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In the Supreme Court of the United States

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CITY OF MILWAUKEE, ET AL., PETITIONERS

v.

STATE OF ILLINOIS, ET AL.

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CITY OF MILWAUKEE, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's invitation of November 26, 1979.

1. The present suit followed upon this Court's denial of leave to Illinois to file an original action to the same end. *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972). Although noting that "new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance," 406 U.S. at 107, the Court

held that the federal common law had not been pre-empted by the Federal Water Pollution Control Act then in effect, 33 U.S.C. (1970 ed.) 1151 *et seq.* Invoking that ruling, Illinois sought from the district court an injunction to restrain the City of Milwaukee and the Sewerage Commissions of the City and County of Milwaukee (collectively, the "City") from discharging raw sewage and inadequately treated sewage into Lake Michigan. Illinois alleged that the City's discharges into Lake Michigan constituted a public nuisance (1) as a hazard to public health, and (2) as a major factor accelerating eutrophication of the lake. The State of Michigan intervened as a plaintiff on the issue of eutrophication only.

Not long after the filing of this suit, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816,[1] and the defendants argued that this substantial revision and expansion of the statutory scheme earlier considered by this Court in *Illinois* v. *Milwaukee* pre-empted plaintiffs' common law action (Pet. App. G-1). The district court denied the motion to dismiss and, after a four-month trial, the court held for plaintiffs (Pet. App. F-1), and entered judgment ordering abatement relief (Pet. App. D-1).

2. On appeal, the City urged, *inter alia*, that the district court had erred in failing to treat the Clean Water Act as determinative of both the City's liability and the nature and extent of appropriate relief (Pet. App. A-2 to A-3). The United States submitted a brief amicus curiae in the court of appeals directed solely to the issue whether the Clean Water Act wholly pre-

[1]Hereafter, the Federal Water Pollution Control Act, as amended, will generally be referred to by its popular name, the "Clean Water Act." See the Clean Water Act of 1977, Pub. L. No. 95-217, Section 2, 91 Stat. 1566.

empted common law actions. We argued that the federal courts remain free to fashion relief appropriate to abate nuisances created by interstate water pollution, but took no position on whether Illinois had established a meritorious common law claim.

The court of appeals affirmed in part and reversed in part. The court agreed with the United States that (1) the Clean Water Act did not pre-empt the federal common law of nuisance (Pet. App. A-17 to A-18); (2) compliance with a discharge permit issued under the Act is not a defense to such a nuisance action (Pet. App. A-19); and (3) abatement relief in such an action is not limited by the Act to imposition of standards no more stringent than those required as a regulatory minimum (Pet. App. A-20 to A-23). The decision went on, however, to hold that the policies, and even the standards, of the Clean Water Act should guide a court in deciding water pollution cases brought on a nuisance theory (Pet. App. A-20 to A-23). Applying this principle, the court found the evidence sufficient to support the conclusion that the City's raw sewage discharges both constitute a hazard to public health and substantially contribute to eutrophication, and thus are subject to abatement (Pet. App. A-26 to A-30). But the court reversed insofar as the district court had imposed an effluent standard for the treatment plants more stringent than that required under the Clean Water Act (Pet. App. A-47 to A-48).

3. The City's petition presents, *inter alia*, the issue of pre-emption left open by the Court in *Illinois* v. *Milwaukee*, *supra*. While that question is not inappropriate for consideration here, we believe it was correctly decided by the court of appeals and, in the absence of any conflict, we cannot conclude that further review is warranted.

The court of appeals, we submit, has persuasively demonstrated that the Clean Water Act, both before and after the 1972 Amendments (Pet. App. A-8 TO A-17),[2] does not pre-empt the common law remedy, notwithstanding the apparently comprehensive sweep of the statute. We highlight only two points.

a. First, as the court of appeals noted (Pet. App. A-18), the provision authorizing "citizen suits" expressly provides in pertinent part:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Section 505(e), 33 U.S.C. 1365(e). And the legislative history of this provision leaves no doubt that Congress intended not only to preserve all common law remedies, but to prevent statutory compliance from becoming an affirmative defense to a common law action.[3]

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[2]In addition to the 1972 Amendments, the Clean Water Act was further amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, which did not change the basic structure of that Act established by the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. The only change which may be relevant here was an extension of the deadline by which municipalities are to achieve compliance with pollution control requirements from July 1, 1977, to no later than July 1, 1983, where compliance has been delayed by construction problems or lack of federal financial assistance. Clean Water Act of 1977, Pub. L. No. 95-217, Section 45, 91 Stat. 1584-1586.

[3]The Senate Report states:

> It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. *Compliance with requirements under this Act would*

b. Second, the technology-based effluent limitations promulgated by the Environmental Protection Agency pursuant to the Clean Water Act establish only the *least* that must be required of a polluter, *i.e.*, a uniform baseline of controls. The states are expressly authorized by Section 510 of the Act, 33 U.S.C. 1350, to adopt and enforce still more stringent controls.[4] The states also are given primary responsibility for adoption of water quality standards under Section 303 of the Act, 33 U.S.C. 1313. More stringent effluent limitations may be necessary to protect the water quality needs of a particular body of water, or, as alleged here, to protect a complaining party from harm which results despite the fact that the discharges are being made under a permit granted pursuant to the Act. This, as the court of appeals held (Pet. App. A-17 to A-18), leaves open a

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not be a defense to a common law action for pollution damages.

S. Rep. No. 92-414, 92d Cong., 1st Sess. 81 (1971) (emphasis added). Similarly, the House Report states:

> Subsection (e) provides that the right of persons (or class of persons) to seek * * * relief under any statute or common law is not affected.

H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 134 (1972).

[4]Section 510, 33 U.S.C. 1370, provides:

> Except as expressly provided in this [Act], nothing in this [Act] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that * * * such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, of standard or performance which is less stringent than * * * [one in effect] under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

continuing role to be played by the federal common law of nuisance, not inconsistently with the Clean Water Act.[5]

For these reasons, among others, we adhere to the submission we made in the court of appeals, that the Clean Water Act did not pre-empt or displace rights and remedies under the federal common law of nuisance.

4. The remaining issues concern the application to the factual situation in suit of the rule that, on proof of nuisance under federal common law, the policies and standards of the Clean Water Act provide "an appropriate starting point" on the issues of relief, but not an automatic limitation (Pet. App. A-20 to A-21).[6] The City's petition for certiorari complains that the court of

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[5]Other federal courts which have faced this question have uniformly concluded that federal common law survives the enactment of the 1972 Amendments, at least as to interstate pollution. *California Tahoe Regional Planning Agency* v. *Jennings*, 594 F. 2d 181, 193 (9th Cir. 1979), cert. denied, No. 79-15 (Oct. 1, 1979); *United States ex rel. Scott* v. *United States Steel Corp.*, 356 F. Supp. 556, 559 (N.D. Ill. 1973); *United States* v. *Ira S. Bushey and Sons, Inc.*, 346 F. Supp. 145, 149-150 (D. Vt. 1972), aff'd mem., 487 F. 2d 1393 (2d Cir. 1974), cert. denied, 417 U.S. 976 (1974). See *United States* v. *Stoeco Homes Inc.*, 498 F. 2d 597, 611 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975); *Township of Long Beach* v. *City of New York*, 445 F. Supp. 1203, 1214-1215 (D. N.J. 1978).

Petitioners point to no conflicting decisions on this question. And the volume of reported common law litigation subsequent to the Court's 1972 decision in *Illinois* v. *Milwaukee* certainly has yet to bear out any "floodgates" argument (79-408 Pet. 22, 31).

[6]"Congress' position in the Act does not, as we have held, mark the limits of our power in this common law nuisance action, but the policy underlying that position, to which we should give some deference, is at least a reason not to allow the nature of the action to cause a relaxation of the requirements of evidentiary foundation that would normally be observed in other kinds of actions." Pet. App. A-46 (footnote omitted).

appeals went too far beyond the requirements of the Act: the cross-petition takes the contrary view.

These are matters as to which the United States expressed no opinion in the court of appeals and it seems inappropriate to do so here. But, whatever the correct result in this case, it does not appear that review by this Court of the nature and scope of relief ordered is warranted. First, once the proposition that the Clean Water Act establishes a floor and not a ceiling is accepted, the propriety of the relief awarded is a question that turns primarily on the particular factual setting. And, second, because there has been no flood of lawsuits brought under the federal common law of nuisance, there is little reason to suppose that the questions of relief arising here will be a recurring problem meriting this Court's attention.

5. Accordingly, we suggest that both petitions for certiorari may appropriately be denied.

Respectfully submitted.

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